Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	
Inter-Carrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68

REPLY COMMENTS OF AT&T CORP.

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SUMMARY

AT&T's opening comments demonstrated that there is no economically rational or lawful basis for distinguishing local voice and data traffic from traffic bound for Internet service providers ("ISPs"), and that the same inter-carrier compensation arrangements that apply to the delivery of local traffic therefore should apply to the delivery of ISP-bound traffic.

The vast majority of commenters, including incumbent local exchange carriers ("ILECs"), agree that a carrier incurs real and significant costs in delivering traffic to an ISP, and that there must be some mechanism that compensates the carrier delivering such traffic when traffic exchanged between the originating and delivering carrier is not roughly in balance. Most commenters, including the ILECs, also agree with AT&T that national rules regarding inter-carrier compensation for ISP-bound traffic will serve the public interest, and that the Commission's rules should apply uniformly to *all* ISP-bound traffic because separate pricing rules for intrastate and interstate ISP-bound traffic would be both unworkable and undesirable.

Despite these areas of agreement, the ILECs have urged the Commission to single out ISP-bound traffic for disparate inter-carrier compensation treatment that favors the originating carrier with a free (or subsidized) ride on its competitors' networks. Significantly, however, the ILECs have completely failed to document any relevant cost differences that could justify singling out ISP-bound traffic for such unique treatment. The record thus supports only one conclusion: the rates, terms, and conditions for transporting and terminating ISP-bound traffic should be identical to the rates, terms, and conditions for transporting and terminating ordinary local traffic.

Rather than produce evidence demonstrating that the costs of delivering ISP-bound traffic differ from delivering ordinary local traffic, the ILECs seek to obfuscate the issue by presenting a number of non-cost related arguments that are both irrelevant and meritless. The ILECs also propose

a series of equally meritless methodological alternatives, including a mandatory "bill-and-keep" approach that improperly ignores all traffic except ISP-bound traffic in determining traffic balance, a "meet point billing" approach that unlawfully ignores both relevant costs and the Commission's clear instruction that it will not revisit here its longstanding policy of treating ISPs as end-users, and a wholly unprincipled compensation "moratorium" that dispenses with law and economics altogether.

With regard to implementation, the majority of commenters, including AT&T, support the Commission's tentative conclusion that inter-carrier compensation for ISP-bound traffic should reflect the determinations made by state commissions in establishing rates for the transport and termination of local voice and data traffic. These commenters confirm that requiring wasteful parallel federal ISP rate arbitrations will only delay and impede competitive entry. ILECs claim that the Commission has no authority to require states to arbitrate interstate rates, but no such requirement is necessary. The Commission need only declare that the rates, terms, and conditions for the transport and termination of ISP-bound traffic between any two carriers in a state shall be the rates, terms, and conditions established or approved by the state commission in such state for the transport and termination of local traffic between the two carriers. State commissions will not be required to make *any* determinations concerning inter-carrier compensation for ISP-bound traffic, but instead will simply continue to establish or approve rates, terms, and conditions for local traffic.

The comments likewise confirm that the Commission should continue to assign the costs of ISP-bound traffic to the intrastate jurisdiction. Under the enhanced service provider ("ESP") exemption, costs associated with ISP-bound traffic are currently assigned to the intrastate jurisdiction because ISPs are treated as local end-users. Consistent with the Commission's decision not to revisit the question of whether the ESP exemption should be removed, those costs must remain assigned to the intrastate jurisdiction, in order to avoid a mismatch between costs and revenues.

Finally, the commenters broadly agree that the Commission, rather than amending its existing "pick and choose" rules, should strongly reaffirm the applicability of those rules. The ILECs advance several self-serving "interpretations" of these provisions in a blatant effort to deny potential competitors the rights to which they are entitled under the law. As AT&T demonstrates, none of these interpretations has any merit.

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REPLY COMMENTS OF AT&T CORP.

Pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, AT&T Corp. ("AT&T") respectfully submits these reply comments in response to the Commission's *NPRM*[1] in this docket concerning inter-carrier compensation for traffic delivered to Internet service providers ("ISPs").

INTRODUCTION

AT&T demonstrated in its opening comments that there is no economically rational or lawful basis for distinguishing ISP-bound traffic from local voice and data traffic for purposes of inter-carrier compensation. ISP-bound traffic is delivered over the same facilities and has the same physical and cost characteristics as other voice and data traffic delivered by one local exchange carrier ("LEC") to another. Accordingly, inter-carrier compensation arrangements for delivery of ISP-bound traffic,

[1] Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, FCC 99-38 (rel. Feb. 26, 1999). In these reply comments, AT&T will refer to the Declaratory Ruling portion of this publication as "*Declaratory Ruling*," and will refer to the Notice of Proposed Rulemaking portion as "*NPRM*."

whatever its jurisdictional nature, should be the same as inter-carrier compensation arrangements for the delivery of local traffic.

The vast majority of commenters agree that a LEC incurs real and significant costs in delivering traffic to an ISP, and that there must be some mechanism that compensates the carrier delivering such traffic when traffic exchanged between the originating and delivering carrier is not roughly in balance.[2] Indeed, even the incumbent local exchange carriers ("ILECs") largely agree that *some* type of inter-carrier compensation arrangement is warranted.[3] Most commenters, including ILECs, also agree with AT&T that national rules regarding inter-carrier compensation for ISP-bound traffic will serve the public interest.[4] And there is general agreement that separate pricing rules for intrastate and interstate ISP-bound traffic would be both unworkable and undesirable, and that the Commission's rules therefore should apply uniformly to *all* ISP-bound traffic.[5]

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[2] *See, e.g.,* AT&T Comments at 1; Bell Atlantic Comments at 6; BellSouth Comments at 8-9; U S West Comments at 1; SBC Comments at 22; GTE Comments at 21; Sprint Comments at 3-6; MCI Comments at 8-9; CompTel Comments at 3; ALTS Comments at 12-13; ICG Comments at 1; Prism Comments at 7; GSA Comments at 13; Global NAPs Comments at 6.

[3] *See, e.g.,*BellSouth Comments at 8-9 (delivering carrier "incurs switching and trunking costs," and primary LEC should "compensate" it); U S West Comments at 1 ("each LEC [should have] an opportunity to recover its costs"); SBC Comments at 22 (delivering carriers should be "compensated for the interstate use of their networks"); GTE Comments at 21 ("all LECs [should] be compensated for their costs of delivering traffic"); Sprint Comments at 3-6.

[4] *See, e.g.,* AT&T Comments at 4-6; Bell Atlantic Comments at 6 (requesting that the Commission establish default rules); BellSouth Comments at 6 ("[f]ederal rules that bind interstate inter-carrier compensation obligations would be appropriate"); U S West Comments at 9 (the Commission "should adopt national ground rules"); GTE Comments at 20-21 (Commission should "establish a single, rational approach"); MCI Comments at 5-8; CompTel Comments at 10-17; ALTS Comments at 9-10; Texas PUC Comments at 6-7 (urging the Commission to establish "broad policy and methodological parameters"); ICG Comments at 3; Prism Comments at 5; GSA Comments at 12; TRA Comments at 2-11; Global NAPs Comments at 6-7; CoreComm Comments at 3-4.

[5] *See, e.g.,* AT&T Comments at 17-19; MCI Comments at 13-14; SBC Comments at 17; Ameritech Comments at 27-29; Bell Atlantic Comments at 7-8; BellSouth Comments at 10-12; GTE Comments at 17-18; SBC Comments at 25-28; U S West Comments at 18-19; Sprint Comments at 7-8; ITAA (continued...)

ILECs, however, betting that they will continue to originate more ISP-bound traffic than they deliver for other LECs, urge the Commission to single out ISP-bound traffic for disparate inter-carrier compensation treatment that favors the originating carrier with a free (or subsidized) ride on their competitors' networks. These incumbents sponsor a dizzying array of inter-carrier compensation schemes that would single out ISP-bound traffic for exceptional treatment, including a "bill-and-keep" approach that would ignore all traffic except ISP-bound traffic in determining traffic balance, an interexchange carrier-based "meet point billing" approach that would ignore both relevant costs and the Commission's clear instruction that it will not revisit here its longstanding policy of treating ISPs as end-users, and a wholly unprincipled compensation "moratorium" that would dispense with law and economics altogether.

That there is no legitimate basis for these schemes -- or, indeed, any inter-carrier compensation approach that would treat ISP-bound traffic differently than local voice and data traffic -- is confirmed by the ILECs' failure to prove (indeed, in most cases, even to allege) significant and categorical differences in the costs of delivering ISP-bound and local traffic. The ILECs instead offer only a series of misguided policy arguments, such as complaints about end-user rate structures that the Commission has previously recognized are properly addressed to state commissions. AT&T briefly responds to each of the ILEC arguments below. But the critical point is this: the *only* conclusion supported by the record in this proceeding is that the rates for delivering ISP-bound and local voice and data traffic should be the same.

With regard to implementation, the majority of commenters, including AT&T, support the Commission's tentative conclusion that inter-carrier compensation for ISP-bound traffic should reflect

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[5] (...continued)
Comments at 3-5.

the determinations made by state commissions in establishing rates for the transport and termination of local voice and data traffic under sections 251 and 252 of the Act.[6] These commenters confirm that requiring wasteful parallel federal ISP rate arbitrations will only delay and impede competitive entry. Recognizing as much, ILECs claim that the Commission has no authority to require states to arbitrate interstate rates. But no such requirement is necessary. The Commission need only promulgate a simple, self-implementing rule: "the rates, terms, and conditions for the transport and termination of ISP-bound traffic between any two carriers in a state shall be the rates, terms, and conditions established or approved by the state commission in such state for the transport and termination of local traffic between the two carriers." Under this proposed rule, the state commissions are not required to make *any* determinations concerning inter-carrier compensation for ISP-bound traffic, but instead only must establish or approve rates, terms, and conditions for local traffic -- a function that they already perform under the 1996 Act.

ARGUMENT

I. THE COMMENTS CONFIRM THAT COMPENSATION FOR THE DELIVERY OF ISP-BOUND TRAFFIC SHOULD BE AT THE SAME RATES AS COMPENSATION FOR THE DELIVERY OF LOCAL TRAFFIC.

Recognizing that a LEC incurs costs in delivering local traffic originated by another carrier, the Commission ruled in its *Local Competition Order* that inter-carrier compensation is required -- either through explicit cost-based charges, or, when traffic is roughly in balance, through bill-and-keep arrangements.[7] As the Commission noted in the *NPRM*, and as many ILECs even admit, carriers

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[6] *See, e.g.*, AT&T Comments at 6 should -7; MCI Comments at 12-14; CompTel Comments at 10; ALTS Comments at 6-7; Texas PUC Comments at 5-6; California PUC Comments at 3; Time Warner Comments at 15-17; GSA Comments at 11; Intermedia Comments at 3; CIX Comments at 2-4; Global NAPs Comments at 11-12; AOL Comments at 3-5; CoreComm Comments at 3.

[7] *See* First Report and Order, *In re Implementation of the Local Competition Provisions in the* (continued...)

undoubtedly incur such costs in terminating ISP-bound traffic as well.[8] It is thus beyond reasonable debate that inter-carrier compensation should extend to ISP-bound traffic, and, absent demonstrated and categorical delivery cost differences between ISP-bound and local traffic, that carriers should apply the same pro-competitive compensation arrangements to both types of traffic -- as carriers have, in fact, done for years under both negotiated and arbitrated arrangements.

The ILECs, the only opponents of equal treatment, have had countless opportunities before state commissions, federal courts, and this Commission to document any relevant cost differences that could justify singling out ISP-bound traffic for disparate treatment. They have completely failed to do so. Indeed, the most noteworthy single fact about the comments filed in this proceeding is that no commenter has even attempted to demonstrate -- let alone produce evidence -- that the costs a LEC incurs in delivering traffic in any way depends on whether circuits are transmitting "voice" or "data" communications -- much less whether or not data traffic is ISP-bound. This glaring omission confirms what AT&T demonstrated in its opening comments: carriers utilize the same facilities, in the same manner -- and thus incur the same costs -- terminating ISP-bound traffic as they do local traffic destined for comparable business users. The record thus supports only one conclusion: the rates, terms, and conditions for transporting and terminating ISP-bound traffic should be identical to the rates, terms, and conditions for transporting and terminating local traffic.[9]

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[7] (...continued)
Telecommunications Act of 1996, 11 FCC Rcd. 15499, ¶¶ 1027-1118 (1996) ("*Local Competition Order*").

[8] *See NPRM*, ¶ 29; *supra* note 3.

[9] GTE speculates that recent technological developments may "have made it possible" for "some" carriers who serve ISPs to avoid some (circuit-switching) costs in some circumstances. GTE Comments at 7. Even if that were true and had been proven, the Commission cannot, and should not, resolve the vitally important questions raised in this proceeding by reference to exceptional cases. As the Commission noted in the *Declaratory Ruling*, as AT&T's comments demonstrated, and as the (continued...)

Rather than produce evidence demonstrating that the costs of delivering ISP-bound traffic differ from delivering ordinary voice or data traffic, the ILECs seek to obfuscate the issue by presenting a number of non-cost related arguments. These arguments are both irrelevant and meritless.

First, the ILECs repeatedly claim that it is inappropriate to require them to pay the same rates for the delivery of ISP-bound traffic and for local voice and data traffic, because the Commission's determination that ISP-bound calls are largely interstate precludes treating this traffic as local. These claims, however, confuse the jurisdictional nature of the traffic, which is determined on an end-to-end basis, with the cost characteristics of the service the delivering carrier provides. Regardless of the end-to-end nature of the call, there can be no dispute that the service provided by the terminating carrier in delivering the call from the point of hand-off from the originating carrier to the ISP's server is functionally and physically indistinguishable from the service provided in delivering local voice and data traffic to other large business customers.

Second, the ILECs repeatedly complain that it is unfair to require them to make inter-carrier compensation payments for ISP-bound traffic, because ISPs have a disproportionate number of inbound calls. This claim, too, provides no basis for treating voice and data traffic differently. As AT&T pointed out in its initial comments, and as the Commission has itself noted, "many of the characteristics of ISP traffic (such as large number of incoming calls to Internet service providers) may be shared by other classes of business customers." First Report and Order, *Access Charge*

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[9] (...continued)
single example provided by GTE confirms, state commissions have ample authority to deal with such putative "carriers." *See Declaratory Ruling*, ¶ 24 n.78; AT&T Comments at 14. Moreover, the technologic developments that GTE discusses apply equally to all IP applications -- both "voice" and "data." If and when LECs deploy these technologies, their termination costs for both local and ISP-bound traffic will be reduced. GTE presents no basis, however, for distinguishing between ISP-bound and local traffic.

Reform et al., 12 FCC Rcd. 15982, ¶ 345 (1997) ("*Access Charge Reform Order*"). Because many large business users, such as utilities, banks and inbound telemarketers, also receive large numbers of incoming calls, it would clearly be arbitrary for the Commission to treat ISP-bound traffic differently from such functionally identical local traffic.

Moreover, the ILECs' complaints in this regard are both misguided and hypocritical. To the extent traffic is disproportionately one-way, there is no legitimate reason for complaining that the termination payments likewise are "one-sided." If an ILEC terminates comparatively less inbound ISP traffic, it incurs fewer costs delivering such traffic, and therefore *should* receive less compensation. That is a principle the ILECs themselves have been quick to embrace in other contexts in which they have expected to be net recipients of traffic. Thus, the ILECs strongly resisted bill-and-keep arrangements in § 252 proceedings to establish reciprocal compensation arrangements.[10] Likewise, the ILECs have insisted that wireless providers pay reciprocal compensation where traffic flows between wireless carriers and LECs are disproportionately one sided in the direction of the landline carrier.[11]

At bottom, the ILECs' concerns with regard to imbalanced traffic appear to rest on the claim that the rates established by the state commissions for transport and termination may be above cost. *See, e.g.*, Ameritech Comments at 13 (complaining about revenue sharing). If that is true, the proper course is not to give originating carriers a free ride with respect to the delivery of their ISP-bound traffic, but for all LECs to seek to enforce the Commission's reinstated pricing rules that will require

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[10] *See, e.g.*, Letter from Catherine R. Sloan, Vice President of Federal Affairs, WorldCom, Inc. to the Honorable William E. Kennard, Chairman, FCC (July 21, 1998) at pp. 2-3 (submitted as an attachment to Letter from Richard S. Whitt, Director, Federal Affairs/Counsel WorldCom to Magalie Roman Salas, Secretary, FCC (July 23, 1998)).

[11] *See, e.g., Local Competition Order*, ¶ 1030.

that transport and termination rates (and, thus, under the rule proposed here, inter-carrier compensation for ISP-bound traffic as well) reflect efficient forward-looking costs (if not subject to bill-and-keep). And the ILECs have only themselves to blame if rates under existing agreements are too high: it was the ILECs, after all, that urged the Eighth Circuit to vacate the Commission's pricing rules.

Third, unable to demonstrate that the costs of terminating ISP-bound traffic differ from the costs of terminating ordinary local traffic, Ameritech instead attempts to demonstrate that the rates it charges its own end users who initiate ISP-bound calls may be too low to cover cost-based inter-carrier compensation payments. AT&T explained in its opening comments why the Commission should generally be deeply suspicious of claims that proliferation of Internet usage has caused net losses to the ILECs,[12] and Ameritech's claim to have used "conservative" assumptions in making its estimates here is demonstrably false.[13] But even if such claims could be substantiated, they would be irrelevant to this proceeding. As the Commission concluded in analogous circumstances, "[t]o the extent that some intrastate rate structures fail to compensate ILECs adequately for providing service

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[12] As AT&T explained in its comments, increased Internet usage has provided many lucrative revenue sources for the ILECs. Moreover, the flat rates LECs charge for local service are based on the cost characteristics of the average user, and the ILECs have not demonstrated (and could not conceivably demonstrate) that, as applied to all users, both low and high volume, equal treatment for ISP-bound traffic causes the ILECs to incur net losses. *See* AT&T Comments at 11-13.

[13] For example, Ameritech assumes that each customer that purchases a second voice-grade line only uses that line to access the Internet. This assumption is not at all conservative because residence customers who purchase a second voice-grade line for the home are unlikely to use the line *only* for Internet access. In addition, business customers who purchase a second line for Internet access are likely to purchase a higher speed line (ISDN, DS1, xDSL), which is priced higher than a voice-grade line, and Ameritech fails to include these additional revenues. Further, the cost analysis is riddled with errors. In Illinois, for example, the state commission-approved $5.01 flat port charge by Ameritech includes all end office switch usage and features, yet Ameritech's analysis includes *additional* usage-based switch costs. The Illinois business usage rate is likewise grossly overstated by failing to reflect applicable non-peak and volume discounts.

to customers with high volumes of [outbound] calls, ILECs may address those concerns to state regulators." *Access Charge Reform Order*, 12 FCC Rcd. 15982, ¶ 346. There is simply no principled basis for allowing an originating LEC to impose on other carriers costs that they do not cause simply because the originating LEC's rate structure is not designed to pass those costs on to its own end-users, who *do* cause these costs.

At the end of the day, therefore, ILEC requests that the Commission adopt mandatory bill-and-keep rules that apply only to ISP-bound traffic,[14] provide a "moratorium" on compensation obligations for such traffic,[15] or (most blatantly) provide no compensation at all,[16] are simply attempts by the ILECs both to obtain a free ride over their competitors' networks and to drive out new entrants who cannot afford to bear such large uncompensated costs. These efforts to obtain differential rates for "like" traffic not only lack any basis in economics or the record, but would violate Section 202(a)'s prohibition on discrimination between "like" services. *See* Time Warner Comments at 1-15.[17]

Finally, U S WEST, Bell South, and SBC assert that in lieu of inter-carrier compensation, the Commission should require that originating and terminating carriers "share" the payments ISPs

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[14] *See* Bell Atlantic Comments at 6.

[15] *See* GTE Comments at 19-20.

[16] *See* Ameritech Comments at 8.

[17] Because there is no rational basis on which the Commission could conclude that the rates for terminating ISP traffic should differ from the rates of terminating voice traffic, or, indeed, the rates of terminating local data traffic, the Commission need not address how carriers might sensibly identify ISP traffic. It is worth noting, however, that none of the commenters who support differential rates suggest any concrete, practical method by which ISP calls can be separated from voice calls. Ameritech, for example, merely states that the Commission should require carriers to use "reasonable diligence" to identify which customer numbers are assigned to ISPs. Ameritech Comments at 20. But, as AT&T noted in its opening comments, carriers do not typically monitor or restrict the usage to which their business lines are put, and it would thus be exceedingly difficult and expensive to separate ISP-bound from local voice and data traffic. *See* AT&T Comments at 10-11.

make for their business lines on a "meet point billing" basis. In support of this claim, these ILECs argue that the Commission has concluded that ISPs use largely interstate access services when calls are delivered to them, and that the meet point billing arrangements generally used when two or more LECs jointly provide *access* services to an interexchange *carrier* should therefore apply. As both Ameritech and Bell Atlantic recognize,[18] this claim is simply a disguised challenge to the Commission's current enhanced service provider ("ESP") "exemption," a regulatory structure the *NPRM* makes absolutely clear is *not* subject to reconsideration here. *See NPRM*, ¶ 34.

Although U S WEST, Bell South, and SBC claim that their proposals do not amount to a challenge to the ESP "exemption" itself, they can do so only by mischaracterizing the nature of that "exemption." In this regard, although the Commission and industry participants often label the Commission's access policy with respect to ESPs as an "exemption," ESPs are in fact not *exempt* from paying access charges. To the contrary, ESPs pay subscriber line charges and, where applicable, special access surcharges, that all *end users* must pay. In other words, the existing Commission policy that is often described as the "ESP exemption" is, in fact, simply a decision to treat ESPs as end users rather than carriers. As the Commission has explained:

> At present, enhanced service providers are treated as end users and thus may use local business lines for access for which they pay local business rates and subscriber line charges. To the extent that they purchase special access lines, they also pay the special access surcharge under the same conditions as those applicable to end users.

Order, *Amendments of Part 69 of Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd. 2631, ¶ 19 n.53 (1988).

In recently deciding to retain this policy, the Commission noted that "it is not clear that ISPs use the public switched network in a manner analogous to IXCs . . . . [M]any of the characteristics

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[18] Ameritech Comments at 13; Bell Atlantic Comments at 6.

of ISP traffic . . . may be shared by other classes of business customers." *Access Charge Reform Order*, 12 FCC Rcd. 15982, ¶ 345. Significantly, the Eighth Circuit affirmed the Commission's decision to retain the "exemption" on precisely this basis. *Southwestern Bell Tel.* v. *FCC*, 153 F.3d 523, 542 (8th Cir. 1998).

Thus, in arguing that ISPs should be treated like IXCs and should therefore pay carriers for delivering traffic to them on a meet point billing basis, these incumbents are indeed mounting a frontal challenge to the ESP exemption -- *i.e.*, to the decision to treat ISPs for access purposes as end users, not as carriers. It would plainly be arbitrary to treat ISPs as end-users with respect to access charges and as carriers with respect to inter-carrier compensation. And, because the delivering LEC would have no choice but to pass on to the ISP costs not recovered from the originating carrier, the ILECs' meet point billing approach would inevitably impact the ISP's own charges to Internet users, thus enabling the originating LEC to do indirectly what the Commission said it could not do directly.

For this reason, the ILECs' repeated assertions that they are providing an access service when they deliver calls to ISPs is irrelevant. The relevant question is whether ISPs should pay for access like other end users, or like carriers. As discussed above, proposals that the Commission adopt "meet point billing" mechanisms simply cannot be squared with the treatment of ISPs as end users. As the Commission is aware, the uniform and longstanding rule throughout the country with respect to local, intrastate toll, and interstate traffic destined to an end user is that the originating customer's *carrier* is responsible for the costs of transmitting the call from the point of origination to the point of completion, and of recovering the costs of termination from the originating customer.[19]

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[19] In the *NPRM* the Commission sought comment on an Ameritech proposal that competitive LECs ("CLECs") and ILECs share in the revenue paid by the ISP's customer to the originating carrier. *NPRM*, ¶ 33. Ameritech, however, has formally revoked its "offer," Ameritech Comments at 14 n.18, and no commenter supports it.

In all events, U S WEST's, Bell South's, and SBC's arguments cannot be lawfully considered in this proceeding. The Commission's *NPRM* expressly disavowed any intention of altering its current treatment of ESPs as end users,[20] and it would therefore be a clear violation of the APA's notice and comment requirements for the Commission to address these ILECs' proposals. *See, e.g.*, 5 U.S.C. § 553(b)(3); *American Federation of Labor* v. *Donovan*, 757 F.2d 330, 338-39 (D.C. Cir. 1985) (striking down agency rule modification when "the clear impression from the notices of proposed rulemaking was that [the rule] would be left untouched").[21]

II. EQUAL TREATMENT FOR INTER-CARRIER COMPENSATION OF ISP-BOUND AND LOCAL TRAFFIC CAN EASILY BE ACCOMMODATED WITHOUT WASTEFUL PARALLEL FEDERAL ARBITRATION PROCEEDINGS.

In its opening comments, AT&T supported the Commission's tentative conclusion that "the inter-carrier compensation for . . . interstate telecommunications traffic should be governed prospectively by interconnection agreements negotiated and arbitrated under sections 251 and 252 of the Act." AT&T Comments at 6 (quoting *NPRM*, ¶ 30). AT&T noted that this approach would facilitate the Commission's policy goals by allowing parties to hold a single set of negotiations and to submit all disputes regarding interconnected traffic to a single arbitrator. *Id.* AT&T further noted that, if the Commission were to conduct separate proceedings limited to ISP-bound traffic, the carriers and the Commission would needlessly be forced to expend significant resources pursuing a

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[20] *See NPRM*, ¶ 34.

[21] Similarly, GTE's comments regarding access pricing flexibility clearly are beyond the scope of this proceeding. Even if those arguments were germane, AT&T has demonstrated repeatedly to the Commission that the pricing flexibility GTE is requesting would be inappropriate under current market conditions. *See, e.g.*, Comments of AT&T Corp. to Update and Refresh the Record, *Access Charge Reform et al.*, CC Docket Nos. 96-262, 94-1 and RM 9210, p. 8-14 (filed Oct. 26, 1998); Comments of AT&T Corp., *Access Charge Reform et al.*, CC Docket No. 96-262, et al., pp. 72-87 (filed Jan. 29, 1997). And, in all events, the Commission has indicated that it will address access pricing flexibility requests in future access docket proceedings. *See Access Charge Reform Order*, 12 FCC Rcd. 15982, ¶ 14.

parallel track of arbitrations and appeals for each state. *Id.* at 7. Moreover, there would be a risk of inconsistent rates -- even with both arbitrators applying the same standard -- thereby potentially imposing additional costs to track ISP-bound traffic (even assuming that some reliable method to identify ISP-bound traffic were available). *Id.* at 7.

The majority of commenters agree with AT&T and support the Commission's tentative conclusion.[22] Further, there is *no* significant rebuttal to AT&T's showing that a parallel track of federal arbitrations and appeals for each state would impose significant costs on both carriers and the Commission, increase the transaction and litigation costs of entry, create the risk of inconsistent outcomes, and further delay the development of local competition. As Time Warner notes, "[c]arriers' costs associated with negotiation and arbitration are likely to be much lower if all issues are resolved in the Section 251-252 context," "the creation of a federal arbitration system could well take considerable time," and a "federal arbitration process would also likely impose substantial and unnecessary burdens on the FCC's resources" and fail to take advantage of the fact that "states have gained substantial experience in overseeing interconnection agreement negotiations." Time Warner Comments at 15-16.

A minority of dissenters nonetheless object to reliance on state commission transport and termination rate determinations. First, despite the fact that the proposed approach represents an accommodation of the states' interests, the Florida Public Service Commission claims that it has no interest in enforcing new federal inter-carrier compensation rules for ISP-bound traffic. *See* FPSC Comments at 6. Second, several ILECs contend that the Commission cannot lawfully require (or, indeed, allow) the states to establish interstate rates for ISP-bound traffic in the context of Section

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[22] *See supra* note 6.

252 proceedings, and that even if the Commission could do so, some states may lack the authority to regulate such traffic under state law.[23]

Whatever their abstract merit, these jurisdictional objections attack a straw man. The Commission need not authorize state commission to do *any* additional work or make *any* determinations with respect to interstate rates to avoid embroiling carriers and the Commission in a costly and time-consuming set of duplicative federal arbitrations. Rather, AT&T proposes only that the Commission adopt the following rule:

> The rates, terms, and conditions for the transport and termination of ISP-bound traffic between any two carriers in a state shall be the rates, terms, and conditions established or approved by the state commission in such state for the transport and termination of local traffic between the two carriers.

This solution is undeniably lawful. It is undisputed (and beyond dispute) that the Commission can regulate interstate communications, and can do so by incorporating by reference the rates, terms, and conditions established or approved by state commissions for local traffic.[24] Indeed, in this very proceeding, a number of ILECs that advocate a meet point billing solution argue that the Commission's Part 69 rules should be amended in precisely this way. *See, e.g.*, U S West Comments

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[23] *See, e.g.*, BellSouth Comments at 4-6; GTE Comments at 11-15; SBC Comments at 16-18; U S West Comments at 12-15; Ameritech Comments at 15-20; USTA Comments at 2-8; Sprint Comments at 6-7.

[24] *See, e.g.*, Report and Order and Notice of Proposed Rulemaking, *In re Expanded Interconnection with Local Telephone Company Facilities Amendment of the Part 69 Allocation of General Support Facility Costs*, 7 FCC Rcd. 7369, ¶ 262 (1992) ("we require those LECs with existing intrastate expanded interconnection arrangements to file on an expedited basis federal tariffs allowing interstate special access traffic to be carried over existing state arrangements pursuant to state rates except for the contribution charge"); (internal footnote reference omitted), *rev'd on other grounds, Bell Atlantic Telephone Cos.* v. *FCC*, 24 F.3d 1441 (D.C. Cir. 1994); *id.* at ¶ 262 n.609 ("[w]e find that the use of state rates . . . is in the public interest, given our desire for expeditious implementation of expanded interconnection"); Report and Order, *In re International Settlement Rates*, 12 FCC Rcd. 19,806, ¶ 46 (1997) (establishing international settlement rates by incorporating by reference foreign carriers' tariffed rates for international transmission and national extension), *aff'd, Cable & Wireless P.L.C.* v. *FCC*, 166 F.3d 1224 (D.C. Cir. 1999).

at 6-7 (a LEC serving an ISP should recover "access revenues" "rated under the same local tariffs that govern those access services today" -- *i.e.*, business line rates established or approved by state commissions).[25]

Furthermore, the proposed rule meets both the ILECs' jurisdictional objections, and the FPSC's claim that it has no interest in administering federal rules governing interstate traffic. Under the proposed rule, the state commissions are not required to make *any* determinations concerning inter-carrier compensation for ISP-bound traffic, but instead only must establish or approve rates, terms, and conditions for local traffic -- a function that the state commissions already perform (unless they elect to cede that responsibility to the Commission). *See* 47 U.S.C. §§ 251(b)(5), 252(b)(1).

Because the proposed rule incorporates by reference the rates, terms, and conditions established in state commission proceedings for local traffic, it also makes it unnecessary for the Commission to conduct duplicative arbitrations or to otherwise set specific rates. The rule thus conserves the Commission's resources, allows the Commission and the industry to avoid a costly set of unnecessary arbitrations and judicial appeals, utilizes the states' experience in overseeing interconnection agreement negotiations, decreases the transaction and litigation costs of entry, and speeds the development of local competition. Indeed, because the states in many instances will already have established rates, terms, and conditions for the transport and termination of local traffic, the adoption of the proposed rule will instantaneously establish the rates, terms, and conditions for the transport and termination of much ISP-bound traffic, and thus will result in the least amount of possible delay.

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[25] *See also, e.g.*, SBC Comments at 22-23 ("[t]he LEC serving the ISP could continue to recover its access compensation directly from the ISP through its intrastate business line charges . . . . [T]his surcharge could be an extension of the special access surcharge described in Part 69.5(c) and 69.115.")

The rule also reflects all of the other fundamental principles described in AT&T's Comments and in Part I above: it is a national rule designed to ensure that LECs will be compensated for the costs they incur in delivering ISP-bound traffic; it recognizes that the costs of delivering ISP-bound traffic generally are the same as the costs for delivering local traffic, and therefore requires the same rates for delivering such traffic; and it acknowledges that, as a practical matter, ISP-bound traffic cannot be separated from local voice and data traffic, and interstate traffic cannot be separated from interstate traffic, and therefore does not require the Commission, the state commissions, the carriers, or the ISPs to attempt to separate such traffic.

Finally, in conjunction with the proposed rule, the Commission also should adopt a rule prohibiting the states from requiring LECs to settle ISP-bound traffic separately from local traffic. Such a rule would recognize that the rates for the delivery of ISP-bound traffic should be identical to the rates for the delivery of local traffic, and that there is thus no rational basis for requiring LECs to settle such traffic separately. It would likewise incent all ILECs to support forward-looking, cost-based rates for all traffic. By contrast, requiring separate treatment would impose wholly unnecessary costs on LECs serving ISPs and discriminate against interstate communications carriers in violation of Section 202(a) of the Communications Act. 47 U.S.C. § 202(a).

III. THE COSTS RELATED TO ISP-BOUND TRAFFIC SHOULD BE ASSIGNED TO THE INTRASTATE JURISDICTION.

The comments confirm that the Commission should continue to assign the costs of ISP-bound traffic to the intrastate jurisdiction.[26] Under the ESP exemption, costs associated with ISP-bound traffic are currently assigned to the intrastate jurisdiction because ISPs are treated as local end-

[26] *See, e.g.*, AT&T Comments at 19-20; Time Warner Comments at 17.

users.[27] Consistent with the Commission's decision not to revisit the question whether the ESP exemption should be removed, those costs should remain assigned to the intrastate jurisdiction, in order to avoid a mismatch between costs and revenues. *See NPRM*, ¶ 36; *see also, e.g.*, Time Warner Comments at 17 (because the Commission is not revisiting the question whether ISPs are to be treated as end-users, there is "no reason to change the longstanding practice of allocating the costs and revenues associated with carrying ISP-bound traffic to the intrastate jurisdiction for separations purposes").

The ILECs' arguments that their costs of *originating* ISP-bound traffic should be assigned to the interstate jurisdiction are simply an improper attempt to remove the ESP exemption through the back door. Under these ILECs' proposals, such costs would be assigned to the interstate jurisdiction and recovered from ISPs pursuant to interstate tariffs, which would be tantamount to removing the ESP exemption. To be sure, the ILECs propose to recover only a portion of these originating costs from ISPs; the rest would be recovered from IXCs through access charges. But the proposed inflation of already bloated interstate access charges only makes matters worse. Permitting the ILECs to recover these costs through interstate access charges would have all of the pernicious effects AT&T identified in its opening comments (at 19-20), including artificial and unwarranted reductions in the ILECs' reported interstate rates of return (in the case of SBC's proposal) or even more direct harms through an exogenous increase in the price caps (as in Ameritech's proposal).[28]

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[27] *See Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture*, Notice of Proposed Rulemaking, 4 FCC Rcd. 3983, 3987 (1989).

[28] *See* Ameritech Comments at 27-29. AT&T will refute Ameritech's specific proposal more thoroughly in the proceeding concerning its waiver petition. *See Ameritech Petition for Expedited Waiver Concerning Treatment of Inter-Carrier Compensation Payments for Interstate ISP-Bound Traffic*, CCB/CPD No. 99-13, AT&T Opposition to Ameritech Waiver Petition (to be filed April 28, (continued...)

The Commission made clear in the *NPRM* that it has no intention of removing the ESP exemption in this proceeding, and therefore the Commission should not even consider these ILEC proposals. Until the Commission revisits the ESP exemption, these costs should remain in the intrastate jurisdiction.

IV. THE COMMENTS DEMONSTRATE THAT THE COMMISSION SHOULD NOT ENGAGE IN A WHOLESALE REVISION OF ITS EXISTING PICK AND CHOOSE RULES.

Finally, the commenters broadly agree that the Commission, rather than amending its existing "pick and choose" rules, should strongly reaffirm the applicability of those rules.[29] The existing rule, as written, is critically important to the development of local competition and provides sufficient protections for all parties, including ILECs (by allowing them to refuse pick-and-choose elections when they can show that such an election would be technically infeasible or would involve legitimate differences in costs). 47 C.F.R. § 51.809. As AT&T noted, the Commission could specify in its order that its new rule extending the local reciprocal compensation rules to ISP-bound traffic would provide a basis for ILECs to break the chain of pick-and-choose elections regarding such traffic when the existing agreements expire. AT&T Comments at 21. But in all events, as MCI WorldCom states (at 22), the Commission should not "reconsider the substance of this particular rule" in the "context of determining the appropriate federal rule to govern compensation for ISP-bound traffic."

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[28] (...continued)
1999). *See also* California PUC Comments at 5 (GTE may be improperly allocating ISP-related costs to the interstate jurisdiction); GCI Comments at 3-5. Both Bell Atlantic and SWBT also are allocating ISP-related costs to the interstate jurisdiction. As a result, SWBT, for example, has claimed an exogenous cost increase of 76.6M in its 1999 annual TRP filings. *See* Comments of AT&T Corp. at 2-8, *In re 1999 Price Cap Revisions* (Apr. 16, 1999).

[29] *See, e.g.*, AT&T Comments at 20-22; CompTel Comments at 16-17; ALTS Comments at 19-22; California PUC Comments at 6-7; MCI WorldCom Comments at 20-22; GST Comments at 21-24; TRA Comments at 11-12; Intermedia Comments at 4-5; PCIA Comments at 7-12; CTSI Comments at 17; Focal Comments at 19.

While there is almost universal agreement that Rule 809 should not be amended, ILECs advance several erroneous interpretations of § 252(i) and Rule 809 in a blatant effort to deny potential competitors the rights to which they are entitled under the law. The most radical of these interpretations is Ameritech's suggestion (at 22-24) that § 252(i) does not entitle a carrier to opt into *any* reciprocal compensation provision of an interconnection agreement, whether it be for local or ISP-bound traffic. That is nonsense. Ameritech's argument is that § 252(i) entitles competing carriers to elect only "interconnection," a "service," or a "network element," and that reciprocal compensation is none of those three things. But delivery of traffic is quite clearly a "service."[30] As such, § 252(i) unambiguously requires Ameritech to "make available" that "service" to other requesting carriers on the same "terms and conditions" -- *i.e.*, the reciprocal compensation arrangements -- as those provided in its interconnection agreements.

Indeed, this interpretation is confirmed elsewhere in § 252 itself. Section 252(c) states that a state commission shall "establish any rates for interconnection, services, and network elements" according to subsection (d) -- the same three things listed in § 252(i). Yet Congress clearly thought that transport and termination of traffic was a "service," because subsection (d)(2) sets forth rules to govern the "transport and termination of traffic" and the associated reciprocal compensation. Therefore, requesting carriers may opt into reciprocal compensation arrangements pursuant to § 252(i).[31]

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[30] Indeed, many ILECs in this proceeding, including Ameritech, have argued vociferously that it is an *interstate access* "service." *See, e.g.*, Ameritech Comments at 6 ("dial-up ISP traffic is the functional equivalent of Feature Group A (FG-A) traffic").

[31] Ameritech's further argument (at 24) that Congress deliberately excluded reciprocal compensation from the scope of Section 252(i) because it involves the costs of both carriers is also unfounded. The Commission's pick-and-choose rule implementing Section 252(i) addresses this very concern, by disallowing an opt-in where the ILEC can show that the requesting carrier would present legitimate (continued...)

Other ILECs argue that even if § 252(i) encompasses provisions governing the transport and termination of local traffic, it does not extend to inter-carrier compensation for ISP-bound traffic, because, these ILECs argue, the Commission's determination that such traffic is predominantly interstate places such compensation outside the scope of § 251(b)(5).[32] Again, the argument leads nowhere. Because new entrants clearly *can* opt into reciprocal compensation arrangements governing local traffic, AT&T's proposal would have the procompetitive effect of entitling new entrants to the same rates, terms, and conditions, when performing the identical service in delivering ISP-bound traffic.[33]

Similarly overstated are the ILECs' arguments that a competing carrier's ability to opt into reciprocal compensation arrangements is limited by Rule 809(c)'s provision that agreements remain available for use for a "reasonable period of time." *See, e.g.*, SBC Comments at 33; GTE Comments at 25-26. To the contrary, Rule 809(c) is designed to protect *competing LECs*, by preventing ILECs from arbitrarily making the terms of interconnection agreements unavailable -- as certain ILECs (like Bell Atlantic) have already attempted to do. *See, e.g.*, ALTS Comments at 20 (Bell Atlantic has refused to allow competing LECs to opt into reciprocal compensation arrangements). The

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[31] (...continued)
cost differences. 47 C.F.R. § 51.809.

[32] *See* Bell Atlantic Comments at 8 (provisions of Section 252(i) "apply only to services covered by interconnection agreements negotiated under section 251");U S WEST Comments at 17 ("section 252(i) does not apply to regulatory obligations imposed outside of a section 251/252 local interconnection agreement"); GTE Comments at ; *see also Local Competition Order*, 11 FCC Rcd. 15499, ¶ 1034 (Section 251(b)(5) applies only to local traffic).

[33] In any event, there can be no dispute that §§ 251 and 252 permit a state commission to impose obligations and requirements on ILECs that go beyond the bare minimum required by § 251. *See* 47 U.S.C. § 251(d)(3). Under the clear terms of § 252(i), such additional state requirements, when "provided under an agreement approved under [Section 252]," must be made available to other requesting carriers. For example, if a state required ILECs to provide an unbundled network element that the Commission's rules did not, no one would suppose that a requesting carrier could not obtain that element pursuant to a pick-and-choose election under § 252(i).

Commission's rule addresses the ILECs' principal concerns by allowing them to refuse an opt-in when the ILEC can show that such an arrangement would not be technically feasible or the requesting carrier would impose greater costs on the ILEC than the original party. 47 C.F.R. § 51.809(b); *see also Local Competition Order*, ¶ 1319. Thus, Rule 809(c)'s "reasonable period of time" provision benefits new entrants by establishing a "floor" beneath which ILECs cannot go, and serves as a "ceiling" on ILECs' duties only to the extent that technical feasibility and cost considerations are present. *Local Competition Order*, ¶ 1319. The Commission therefore should strongly reaffirm that, absent those technical feasibility and cost considerations, competing LECs should be able to make pick-and-choose elections.

CONCLUSION

For the reasons stated above, the Commission should modify its proposals in the *NPRM* in accordance with AT&T's comments and reply comments.

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April 27, 1999

CERTIFICATE OF SERVICE

I, Rudolph M. Kammerer, do hereby certify that on this 27th day of April, 1999, I caused a copy of the foregoing Reply Comments of AT&T Corp. to be served upon each of the parties listed in the attached Service List in the manner indicated.

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